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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

D. G. McKINLEY AND J. L. BRAY, plaintiffs in error, *v.* THE UNITED STATES OF AMERICA. } No. 417.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

The defendants were indicted for keeping and setting up a house of ill fame within the distance prohibited by the Secretary of War under the authority of section 13 of the Selective Service Act of May 18, 1917, 40 Stat. 76, 83 (R. 1). After a trial they were each convicted and sentenced (R. 1, 2). Thereupon they have presented to this court a bill of exceptions (R. 2, 3) in which it is stated that after the verdict and sentence the defendants made a motion in arrest of judgment on the ground that the bill of indictment and all the subsequent proceedings were null and void for the reason that the Act of May 18, 1917, *supra*, was unconstitutional, and that the motion in

arrest of judgment was overruled by the court, to which ruling the defendants excepted (R. 2, 3).

The only assignment of error is the action of the court in overruling the said motion in arrest of judgment (R. 6).

I.

The writ of error should be dismissed for lack of jurisdiction.

(*a*) The only error assigned is that the District Court erred in overruling defendants' motion in arrest of judgment, based on the ground that the statute under which the indictment was presented was unconstitutional so that all of the proceedings in the case were null and void (R. 2, 3). This alleged error of the District Court is brought to the attention of this Court solely by the medium of a bill of exceptions. This is a use of a bill of exceptions unwarranted by law. Such a bill can not bring up errors in the record proper. It *must* be confined to errors occurring at the trial as to which there can be no record. If this be not true, it follows that the entire course of a case from the filing of the complaint or the presentment of the indictment down to its submission to the Court of Error might be summarized for the benefit of that court in narrative form in a bill of exceptions, thus depriving the court of the right to examine the very record of the proceedings, *ipsissimis verbis*. A motion in arrest of judgment based upon the alleged unconstitutionality of a statute of the United States, and an order denying

such motion, can not be brought to the notice of this Court in any less formal manner than by a production of the actual record of the court upon the matter.

The only statute of the United States dealing with bills of exceptions—section 953, R. S., as amended—clearly contemplates in all its provisions that a bill of exceptions is confined to matters occurring at the trial, excluding even the motion for a new trial.

In *Walton* v. *United States*, 9 Wheat. 651, 657, 658, this Court said:

> *It is a settled principle that no bill of exceptions is valid, which is not for matter excepted to at the trial.* We do not mean to say that it is necessary, (and in point of practice we know it to be otherwise,) that the bill of exceptions should be formally drawn and signed, before the trial is at an end. It will be sufficient, if the exception be taken at the trial, and noted by the court, with the requisite certainty; and it may afterwards, during the term, according to the rules of the court, be reduced to form, and signed by the judge; and so, in fact, is the general practice. But in all such cases, the bill of exceptions is signed nunc pro tunc; and it purports on its face to be the same as if actually reduced to form, and signed, pending the trial. *And it would be a fatal error, if it were to appear otherwise; for the original authority, under which bills of exceptions are allowed, has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before the verdict.* [Italics ours.]

The general nature and functions of a bill of exceptions are explained by this Court in *Ex parte Crane*, 5 Pet. 190, 199; *Barton* v. *Forsyth*, 20 How. 532, 533, 534; *Railway Company* v. *Heck*, 102 U. S. 120; and especially in *Nalle* v. *Oyster*, 230 U. S. 165, 176–179. In the latter case it is said (230 U. S. 177):

> And on the other hand, the function of an exception is not confined to rulings made upon the trial of the action.

The context shows clearly, however, that this Court did not refer to errors which could be made a matter of record, but to those which would be *in pais* if not preserved by a bill of exceptions.[1] The matter is also thoroughly considered by Judge Taft delivering the opinion of the Court of Appeals in *Johnson* v. *Garber*, 73 Fed. 523.

It is true that these decisions deal with the time when exceptions must be noted as to *matters occurring at the trial*, or with the necessity for a bill of exceptions where the alleged error appears of record, and not directly with the question whether, on error, the absence of the actual record of the court below can be supplied by a bill of exceptions; but all of them assume as beyond question that the very record of the lower court is the only source of information

[1] Lord Coke in 2d Inst., 427, clearly intimates that a bill of exceptions must be prayed before judgment. Blackstone, vol. 3, p. 372, confines it to matters occurring at the trial. In *Ford* v. *Potts*, 1 Halst. 388, referred to with approval in *Defiance Fruit Company* v. *Fox*, 76 N. J. Law, 482, 489, the bill was confined to "errors which could not properly be inserted in the record."

open to the Court of Error where it is available, and that the sole function of the bill of exceptions is to bring into the record matters which, from the necessity of the case, have not the accurate authentication of the record itself.

In the case of *Onondaga Insurance Company* v. *Minard*, 2 N. Y. 98, the English practice of taking a verdict subject to the opinion of the court *in banc* with leave to except was followed. The court *in banc* having decided that the plaintiff should be nonsuited, it excepted to this decision, and sought to raise the question by a bill of exceptions. After referring to the Statute of Westminster 2, and the New York statute reenacting it, the court said (2 N. Y. 100):

> These statutes confined the taking of the bill to the trial, and such was the universal practice under them.

Accordingly it was held that there was nothing before the court on which it could act.

(*b*) The point is not merely technical, although orderly procedure in courts of justice is of more importance to the proper exercise of the judicial power than might at first sight be supposed. In the case at bar, however, there is an attempt to raise a most important constitutional question without giving either the Department of Justice or this Court the benefit of an inspection of the exact record upon the subject.

The writ of error should, therefore, be dismissed for lack of jurisdiction.

II.

Congress had power under the Constitution to enact section 13 of the act of May 18, 1917.

(*a*) The power of Congress to enact this statute *as a whole*, under the constitutional power to raise and support armies, and to make rules for their government and regulation, is settled by the decision of this Court in *Arver* v. *United States*, 245 U. S. 366.

(*b*) The general power of Congress under this constitutional grant to protect the health of its soldiers, spiritual, mental, and physical, would have been supposed to be too clear for argument, had it not been for the brief submitted by the plaintiffs in error. This brief challenges the right of Congress to prohibit the keeping or setting up of bawdy houses within a designated distance from places where the military forces of the United States are situated. Such a claim is absolutely frivolous. Of all the evils tending to destroy the efficiency of an army, and therefore legitimately connected with and included under the power to make rules and regulations for its government and support, this is certainly as important as any. No attack can warrantably be made upon the statute on this ground.

The plaintiffs in error rely upon the case of *Keller* v. *United States*, 213 U. S. 138. It has absolutely no application. There it was held that the particular exercise of power by Congress in the statutory provision under consideration was outside of and beyond the power to regulate interstate and foreign com-

merce. The decision would be applicable to the case at bar if the protection of persons in the military service from the evils denounced by section 13 of Selective Service Act had no connection with the power of Congress to raise and support armies. As, however, the connection is most intimate, the Keller case has no bearing upon the case at bar. It may be said in regard to the citation of this case by the plaintiffs in error what was said in regard to a like citation in *Brolan* v. *United States*, 236 U. S. 216, 222:

> In fact it is true to say of the citation of these cases as well as of the reference to the *Keller Case* that a proposition which is so wholly devoid of merit as to be frivolous is not given a substantial character by an attempt to support it by contentions which are themselves wholly devoid of merit and frivolous.

See also *United States* v. *Bitty*, 208 U. S. 393; *Lottery Case*, 188 U. S. 321, 356; *Hippolite Egg Company* v. *United States*, 220 U. S. 45, 58; *Hoke* v. *United States*, 227 U. S. 308, 320–323.

If, therefore, the claim of the plaintiffs in error has no other basis than that stated in the brief filed on their behalf, the petition in error should be dismissed for the reason that the constitutional question alleged to be involved is so well settled as to be frivolous. It should be noted that neither the assignments of error nor the so-called bill of exceptions state any ground upon which it is asserted that the

Act is unconstitutional or Congress without authority to enact it. The only point made in the brief is that the Act of Congress is unconstitutional because invading the state's exclusive field and one covered by the state statutes. No point is made on the right of the Secretary to make regulations, and the authority, if challenged, is clearly sustained by the decisions of this Court. *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Buttfield* v. *United States*, 192 U. S. 499; *Union Bridge Company* v. *United States*, 204 U. S. 364; and *United States* v. *Grimaud*, 220 U. S. 506.[1]

CONCLUSION.

The writ of error should be dismissed for lack of jurisdiction or the judgment of the court below should be affirmed.

CLAUDE R. PORTER,
Assistant Attorney General.
W. C. HERRON,
Attorney.

FEBRUARY, 1919.

[1] See also *United States* v. *Peins Company*, 235 Fed. 961; *Estes* v. *United States*, 277 Fed. 818; *United States* v. *Romard*, 89 Fed. 156; *United States* v. *Ormsbee*, 74 Fed. 207; *Broadbine* v. *Revere*, 182 Mass. 598; *Polinsky* v. *People*, 73 N. Y. 65; *State* v. *Normand*, 76 N. H. 541.

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McKINLEY ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 417. Submitted March 3, 1919.—Decided April 14, 1919.

Congress, under the authority to raise and support armies, may make rules and regulations to protect the health and welfare of the men composing them against the evils of prostitution, and may leave the details of such regulations to the Secretary of War.

Conviction sustained, for setting up a house of ill fame within five miles of a military station, the distance designated by the Secretary of War, under the Act of May 18, 1917, c. 15, § 13, 40 Stat. 76.

Affirmed.

THE case is stated in the opinion.

Mr. R. Douglas Feagin for plaintiffs in error. *Mr. Oliver C. Hancock* was on the brief.

Mr. Assistant Attorney General Porter and *Mr. W. C. Herron* for the United States.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

Plaintiffs in error were indicted, convicted, and sentenced upon an indictment in the District Court of the United States for the Southern District of Georgia for violation of a regulation of the Secretary of War made under the authority of the Act of Congress of May 18, 1917, c. 15, § 13, 40 Stat. 76, 83. This statute provides:

"The Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both."

Plaintiffs in error contend that Congress has no constitutional authority to pass this act. The indictment charged that the plaintiffs in error did unlawfully keep and set up a house of ill fame within the distance designated by the Secretary of War, under the authority of the act of Congress, to-wit, within five miles of a certain military station of the United States.

That Congress has the authority to raise and support armies and to make rules and regulations for the protection of the health and welfare of those composing them, is too well settled to require more than the statement of the proposition. *Selective Draft Law Cases*, 245 U. S. 366.

Congress having adopted restrictions designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in the statute under consideration, may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions. This is also well settled by the repeated decisions of this court. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Grimaud*, 220 U. S. 506.

The judgment of the District Court is

Affirmed.